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National Association of Certified Public Accountants, a corporation, appellant, vs. The United States of America. Brief for appellee. In the Court of Appeals of the District of Columbia, October term, 1922. No. 3870

Peyton Gordon

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STATEMENT OF THE CASE.

This appeal involves the question of whether or not the appellant, National Association of Certified Public Accountants, a corporation, may be enjoined from issuing so-called "degrees of certified public accountant."

A bill in equity was filed by the United States, through its attorney for the District of Columbia, under the provisions of section 793 of the Code of Law for the District of Columbia, which section reads as follows:

> SEC. 793. INJUNCTION.—The district attorney may file a bill in the name of the United States in said supreme court for the purpose of restraining by injunction any corporation

> organized under the laws of the District from assuming or exercising any franchise, liberty, or privilege or transacting any business not allowed by its charter or certificate of incorporation or not by law allowed to be assumed or exercised by said corporation, and said district attorney may file a bill to enjoin any foreign corporation from transacting in the District of Columbia any business not allowed by its charter or certificate of incorporation, or from transacting any business in said District when it has not complied with any provision of this code relating to foreign corporations; and in the same manner may file a bill to restrain any individuals from exercising any corporate rights, privileges, or franchises not granted to them by law; and on the filing of any such bill the said supreme court shall have power to issue an injunction as prayed and to exercise all the powers of a court of equity over the subject matter of such bill.

The bill (Rec. p. 2) alleges, in substance, that the appellant was incorporated in the District of Columbia with four incorporators, and that the certificates of incorporation set forth that the purposes for which the corporation was formed were—

> To bring together in one common union certified public accountants who are now, or heretofore have been, engaged in the practice of professional accounting; also those who, by virtue of education, personal endowments, technical training, and experience are qualified to perform the duties pertaining to

> professional accounting; to provide for the admission of members; and when said members shall have presented satisfactory evidence of knowledge in the theory and practice of accounting, and shall have satisfactorily passed the prescribed qualifying examination of the association to admit said members to the degree of certified public accountant, *and to issue to such members the association's formal certificate to that degree pertaining;* to safeguard the rightful professional interests and promote the freindly and social and public relations of the members of this corporation; and to do all else incident, appurtenant, and germane to the purposes and objects of this corporation.

The bill further sets up facts showing that appellant was issuing indscriminately, for the sum of $10 each, degrees of certified public accountant, and that, in the nine months of its existence, it had issued over 2,500 such degrees. The form of the degree is reproduced opposite page 24 of the record.

The bill concludes with a prayer that the appellant be enjoined from issuing these degrees.

The defendant answered (Rec. p. 28), admitting its incorporation and the issuance of the degrees, as set forth in the bill. It endeavored in its answer to allege facts to substantiate its claim that it was acting in good faith in issuing such degrees, and that such degrees were issued only after a full and careful examination into the qualifications of the applicants.

The Government then moved to strike out the answer and for a decree pro confesso, on the grounds

(1) that the answer alleged no facts which, if true, constituted a defense to the cause of action alleged in the bill of complaint, and (2) that the answer admitted that the defendant was incorporated in the District of Columbia, as alleged in the bill, and that it was issuing the so-called degrees of certified public accountant, as alleged. (Rec. p. 45.)

This motion was granted, with leave to defendant to amend its answer, but, defendant electing not to amend and to stand upon its answer as filed, a final decree was entered enjoining it from issuing such degrees. (Rec. pp. 45, 46.)

From this decree appellant prosecutes this appeal.

ARGUMENT.

I.

There is no authority in law for a corporation organized under the laws of the District of Columbia to issue degrees of certified public accountant.

The designation "certified public accountant" has come to have a well-defined meaning. It refers to one who has had that title conferred upon him by a State. In every State of the Union there are statutes prohibiting one from using this or a similar designation, or the abbreviations "C. P. A.," unless he has been authorized so to do by a State board, in a manner similar to that by which a license is granted a physician to practice his profession or by which a lawyer is admitted to the bar. The District of Columbia is the only place in the United States where there is not such a statute.

The statutes of the several States relating to public accountants are substantially the same. The law of Maryland, as amended by the act of 1916, is a fair example of all. (Bagby's Ann. Code of Md., vol. 4, p. 555.) Section 1 of this statute provides that a person "who shall have received from the Governor of the State of Maryland a certificate of his qualification to practice as a certified public accountant, as hereinafter provided, shall be styled and known as a certified public accountant, *and no other person shall assume such title, or use the abbreviation 'C. P. A.' or any other words, letters, or figures to indicate that the person so using the same is such certified public accountant.*" Section 2 provides for the appointment of an examining board; section 3 defines the nature of the examination to be given; section 4 authorizes the revocation of certificates for cause; section 5 prescribes the necessary educational requirements; section 6 provides for reciprocity with other States under certain conditions, and section 7 fixes the penalties for violations of the law.

The only provision in the District Code authorizing the conferring of degrees is found in Subchapter I of the incorporation law of the District, relating to institutions of learning (secs. 574 to 586, D. C. Code), and it was held in *Dancy* v. *Clark* (24 App., D. C. 487) that it was intended that the various forms of corporations were to be kept separate. But the degrees there referred to in Subchapter I are academical and honorary, and it is contended by counsel for appellant, and with their contention we have no

quarrel, that the so-called degree of certified public accountant is not such a degree as is contemplated by that subchapter of the code.

From the form of appellant's certificate of incorporation and the number of incorporators it is manifest, as admitted on page 1 of appellant's brief, that appelland was incorporated under Subchapter III of the District incorporation law, relating to benevolent, educational, and kindred societies (secs. 599 to 604, D. C. Code). Section 599 of the code sets forth the purposes for which such a corporation may be formed, as follows:

> SEC. 599. CERTIFICATE.—Any three or more persons of full age, citizens of the United States, a majority of whom shall be citizens of the District, who desire to associate themselves for benevolent, charitable, educational, literary, musical, scientific, religious, or missionary purposes, including societies formed for mutual improvement or for the promotion of the arts, may make, sign, and acknowledge, before any officer authorized to take acknowledgment of deeds in the District, and file in the office of the recorder of deeds, to be recorded by him, a certificate in writing, in which shall be stated—
>
> First. The name or title by which such society shall be known in law.
>
> Second. The term for which it is organized, which may be perpetual.
>
> Third. The particular business and objects of the society.

> Fourth. The number of its trustees, directors, or managers for the first year of its existence.

Contrary to the statement on page 2 of appellant's brief that it was permanently enjoined from making any use of its charter, the prayers of the bill did not seek to prevent, and the final decree does not prevent, appellant from operating under the provisions of its charter relating to an organization for mutual improvement, inasmuch as, to that extent, it is conceded appellant had the authority of the section of the code above quoted. But there is no provision of law authorizing this or any other District of Columbia corporation either to confer the degrees complained of or to certify that one is a *public* accountant.

A corporation, being the creature of statute, can be organized only for the objects authorized by the law under which it is created, and can exercise only the powers expressly conferred upon it by statute or such as are necessarily incident to carrying into effect the authority expressly granted. Of course, the conferring of the degrees complained of is not a necessary incident to the organization of a mutual improvement association.

> A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which the act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes.

> Purposes and means are within the State's control.
>
> *Waters-Pierce Oil Co.* v. *Texas,* 177 U. S. 28, 43.

See also

> *Central Transportation Co.* v. *Pullman's Car Co.,* 139 U. S. 24, 48, 49.
>
> *Oregon Railway Co.* v. *Oregonian Ry. Co.,* 130 U. S. 1.

This rule should be applied with the utmost strictness where a corporation, as here, is assuming to confer a designation of a public character.

While the District of Columbia possesses no statute prohibiting one from designating himself as a certified public accountant, or, as more commonly abbreviated, a "C. P. A.," that term, when used by an accountant in the District of Columbia, has come to mean that some State has certified that he is possessed of superior education and skill, and is of good moral character. Therefore, a resident of the District, in employing an accountant, would be guided in his selection to one possessing such a certificate. But this designation becomes valueless in this District, if this appellant be permitted to confer upon those whom it sees fit, the degree complained of.

In this connection the letter from the appellant to Harry W. Bundy (Rec. p. 15) is of interest. There it is said:

> We have adopted the following designation for signature of members of the national association outside of the District of Columbia, C. P. A. (N. A.).

In other words, this appellant instructs its members practicing accountancy in the States to add to the abbreviation "C. P. A." the letters ("N. A."), which stand, of course, for national association, in the hope that thereby its members can improperly receive credit from the public for having passed a State board, and at the same time, upon a technicality, escape prosecution for violation of the State laws. But its members doing business in the District are advised that they may, with impunity, by virtue of this so-called degree, hold themselves out as certified public accountants.

II.

Appellant acquired no right to issue the degrees complained of by virtue of the recording of its charter.

It is contended by counsel for appellant that, when the recorder of deeds accepted for filing and recording the certificate of incorporation containing the clause relating to the issuance of degrees of certified public accountant, that certificate became a contract between appellant and the United States which can not be attacked in this proceeding. Had the recorder refused to accept the whole certificate for filing, because of the objectionable provision, he would have been well within his rights.

In the case of *Dancy* v. *Clark*, 24 App. D. C. 487, a certificate was presented to the recorder of deeds for the incorporation under subchapter 4 of the incorporation law of the District (secs. 605 to 644,

D. C. Code) of a company to engage in a number of forms of businesses. The recorder refused to accept the certificate, and a proceeding was brought for a writ of mandamus to compel him to receive the certificate. This court, holding that a corporation could be formed for only one of the purposes enumerated in subchapter 4, refused the writ.

That the recorder of deeds, in the press of business, failed to notice the improper part of appellant's certificate of incorporation, and accepted and received the same, does not create a valid contract between appellant and the United States. A contract entered into in violation of law is void.

In the case of *Oregon Railway Co.* v. *Oregonian Ry. Co.*, 130 U. S. 1, the court said:

> Of course any authority for the exercise of corporate powers, derived from the laws of Oregon, must be in accord with the constitution of that State and its statutes upon that subject. * * * It is idle to say, therefore, that any corporation could assume to itself powers of action by the mere declaration in its articles or memorandum that it possessed them.

In the *Dancy case*, this court said:

> Consequently, even if a paper appears to have been regularly executed so as to entitle it to record, and the recorder had exceeded his authority in refusing to receive and record it, yet the court will not, by the writ of mandamus, coerce his action, if it appears upon consideration of the contents of the paper that

> it is invalid in law, for, in that event, to coerce his action and to command his receipt of the paper would be a nugatory thing in law.

In the same case, the court, referring to a situation where, as here, a certificate of incorporation containing objectionable features had actually been received and filed, said:

> In such cases the certificate is upheld so far as it is valid, and the illegal parts, if any, are disregarded.

And in the case of *American Elementary Electric Co.* v. *Normandy*, 46 App. D. C. 329, this court said:

> That the articles of incorporation of the District company were voidable is clear under the decision of this court in *Dancy* v. *Clark*, 24 App. D. C. 487. A corporation many not be lawfully formed here to accomplish all the objects enumerated in those articles, and no primary purpose is expressed, nor is one deducible from the language used. Consequently the objects enumerated must be viewed as a whole, and, when so viewed, it is apparent that there was no warrant in law for the incorporation.

As before pointed out, all that the Government prayed in this proceeding, and all that the final decree accorded it, was that the illegal part of appellant's charter be disregarded.

III.

Appellant's scheme is fraudulent.

In the view we take of this case, since appellant is assuming to exercise corporate privileges without authority of law, it is immaterial whether or not it is so acting in good faith. However, the bad faith of appellant should not pass unnoticed. A reading of the conceded facts in the record of this case can not but be convincing that appellant's whole scheme in issuing the so-called degrees of certified public accountant is a fraudulent one: First, to aid the unscrupulous person under some semblance of right to represent to the public that he possesses the necessary qualifications as to education, ability, and character to be certified by a State as a public accountant; and, second, to induce the innocent person to part with the sum of $10 in return for a worthless sheet of paper purporting to confer upon him the degree of certified public accountant, with "*all the honors, rights, and privileges to that degree appertaining,*" in the belief that he is receiving something of value. Appellant represented, and it is not denied (see letter to Morris, Rec. p. 10), that "The association is duly incorporated under the laws of the District of Columbia, and by this law we are empowered to admit members of the degree of C. P. A. and issue to them the certificate of the National Association C. P. A."

The two letters from appellant to Harry W. Bundy (Rec. pp. 15, 16, and 17), which are not denied in the answer, present a striking example of appellant's

lack of good faith. The first letter, dated December 24, 1921, advises Bundy that "the board of examiners of the national association have passed favorably on your application," and "on December 24th we sent you your membership certificate, to be delivered to you by the American Railway Express Company." Just why the express should have been resorted to instead of the more convenient method of the mail is hard to explain, except upon the theory that the officers of appellant corporation knew they were engaged in a fraudulent scheme and hoped, if possible, to evade prosecution for using the mails to defraud. The certificate referred to in the letter (Rec. pp. 15 and 16) recites that Bundy had "presented satisfactory evidence as to his knowledge of the theory, science, and practice of accountancy" or had "passed the prescribed examination," and "upon him is conferred the degree of certified public accountant, with all of the honors, rights, and privileges to that degree appertaining." Apparently something occurred after the writing of this letter and the expressing of the certificate to place the officers of appellant corporation upon their guard, and they followed it, on December 28th, with another letter reading, in part, as follows:

> After careful investigation the board of examiners and the board of governors of this organization have arrived at the conclusion that while you do not meet the standards set for our members, yours is a worthy case, and in order that you will be given an incentive

> to greater effort so as to perfect *yourselves* in accountancy and to hold up the standards of this profession and to raise if possible the standards now produced, we have decided to accept you as a member and to urge upon you the necessity of continually striving to perfect your knowledge of the theory and practice of the profession.
>
> We request and urgently urge you to *restrain* from using your title or from attempting to practice the profession until such time as you know that you are sufficiently qualified to meet the demands which may be made upon you.

Stripped of its camouflage and self-serving declarations, this letter is a plain admission that appellant conferred its so-called degree of certified public accountant upon one whom it knew was not qualified as an accountant. Another instance of bad faith is that, while in this letter appellant urgently requests Bundy not to make use of the title bestowed upon him, it addresses him as "Mr. Harry W. Bundy, C. P. A. (N. A.)."

That appellant corporation was organized solely for the purpose of selling the degrees complained of is apparent from the assertion of counsel for appellant on page 2 of their brief that a final decree was entered "permanently enjoining appellant from making any use of its charter." Inasmuch as such relief was neither prayed nor granted, counsel's statement can be justified only upon the theory that the only portion of the charter which appellant regarded as of

any value, and the only portion used or intended to be used, is that which relates to the issuance of these degrees. The clauses of the charter providing for an organization for mutual improvement were undoubtedly inserted to conceal the real object of the corporation from the watchful eye of the recorder of deeds. Nor is it surprising that appellant values the objectionable provision above all others when we consider that in the nine months of its existence before the filing of this suit it had sold over 2,500 of its worthless degrees at $10 each. Surely such an income-producing charter provision is not to be treated lightly.

IV.

A motion to strike is the proper procedure to test the sufficiency of an answer.

It is conceded that prior to the new equity rules the only method provided for testing the sufficiency of an answer was by setting the case down for hearing upon bill and answer. This was because the answer was more than a pleading—it was evidence for the defendant. But equity rule No. 10 of the Rules of Practice of the Supreme Court of the District provides:

> The verification of a pleading does not apply to the amount claimed except in an action founded on contract, express or implied, for the payment of money only; *and verification shall not make other or greater proof necessary on the side of the adverse party.*

Thus, it will be seen, an answer has lost its evidentiary character, and has become a mere pleading.

Equity rule No. 39 of the Supreme Court of the District (which is identical with rule 33 of the Federal Equity Rules) provides as follows:

> Exceptions for insufficiency of an answer are abolished. But if an answer set up an affirmative defense, set-off, or counterclaim, the plaintiff may, upon five days' notice, or such further time as the court may allow, test the sufficiency of the same by motion to strike out. If found insufficient but amendable, the court may allow an amendment upon terms or strike out the matter.

The practice adopted in this case has been followed and approved in a number of cases in the Supreme Court of the District. On page 95 of the record in the case of *Federal Trade Commission* v. *Claire Furnace Co. et al.*, No. 3798 in this court, will be found an opinion by Mr. Justice Bailey sustaining this practice, the material portions of which opinion read as follows:

> Under the rules and practice in equity prior to the present rules there is no question but that no demurrer to an answer would lie, nor was there any way of testing the sufficiency of an answer as a defense but by setting down the case for hearing on bill and answer. An answer was evidence as well as a pleading; and on hearing on bill and answer, the answer being evidence, the hearing was final. Even where the bill waived an answer under oath, and an unverified answer was filed, the same

rule was followed where the hearing was on bill and answer. This was expressly provided for in the rules of the United States Supreme Court. (Equity rule 41.)

"If the complainant in his bill shall waive an answer under oath, * * * the answer of the defendant, though under oath, * * * shall not be evidence in his favor unless the cause be set for hearing on bill and answer only * * *."

This provision of the former rules was not carried into the present rules. An answer, although verified (excluding answers to interrogatories), is no longer evidence. While the sufficiency of a plea (which was never evidence) could be tested by setting it down for argument, under the new rules the matter of a plea must be incorporated in the answer and the plea becomes a part of the answer.

In my opinion, by analogy to the former practice in regard to pleas, the sufficiency of the matters of both pleas and answers as defenses may be tested by proceedings in the nature of setting down the same for argument or by a motion to strike, the latter being more in accordance with the present methods of testing the sufficiency of bills and cross claims. In *Shera* v. *Merchants Life Ins. Co.*, 237 Fed. 484, the same view of the present practice is taken.

In the case of *Shera* v. *Merchants Life Ins. Co.*, 237 Fed. 484, the court said:

(1) Under previous equity rules, upon submission upon bill and answer, the answer

> became evidence—"the only evidence that defendant needs, for it must be taken as true in all respects." *Harris Reynolds* v. *First National Bank*, 112 U. S. 405. The present equity rules do not seem to contemplate the submission of a case upon bill and answer; they seem rather to direct that the sufficiency of the answer as a defense, in view of the averments of the bill of complaint, shall be raised by motion to strike. (Equity rule 33.)

This procedure was impliedly recognized by this court in *Phillips* v. *Noel Construction Co.*, 49 App. D. C. 379, where it is said:

> But this is denied by said defendants in their answer, which has to be taken as true under the course the plaintiffs have seen fit to pursue in presenting their case; that is, by their motion to strike out and electing to stand upon that motion when overruled.

This practice is one which should meet with the approval of this court. It furnishes an expeditious and inexpensive method of securing justice to a plaintiff with a meritorious case. It clears the trial calendar of cases in which no sufficient defense has been interposed, without depriving the defendant of any right he might otherwise have. Certainly, if a defendant is unable to allege a defense, he would be unable to prove one.

It is impossible to conceive of any injury resulting to appellant by reason of the adoption of this procedure. To sustain this decree, it is only necessary

to find the existence of two facts—(1) that appellant was incorporated in the District of Columbia as alleged and (2) that it was issuing the degrees complained of—both of which facts are admitted by the answer. Had the Government elected to calendar the case for trial, and a trial been had, no evidence need have been offered, since all of the material allegations of the bill are admitted. Appellant was given an opportunity to amend, which it declined, electing to stand upon its answer as filed. What advantage could appellant have gained other than delay had the Government been required to proceed to trial? As all of the material facts of the case were before the court and undisputed, a final decree was appropriate.

CONCLUSION.

It is respectfully submitted that the decree of the court below should be affirmed.

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United States Attorney.
VERNON E. WEST,
Assistant United States Attorney.

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